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IN THE

# Supreme Court of the United States

October Term, 1959

No. [redacted] 144

LAURENCE TISCH, MRS. LAURENCE TISCH, ABRAHAM TISCH and MRS. SADIE B. TISCH,

Petitioners,

vs.

ABE ZABLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF FOR RESPONDENT IN OPPOSITION

CLAUDE PEPPER
and
ALFRED I. HOPKINS
37 N. E. First Avenue
Miami, Florida,
Counsel For Respondent.

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IN THE

# Supreme Court of the United States

October Term, 1959

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## No. 1030

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LAURENCE TISCH, MRS. LAURENCE TISCH, ABRAHAM TISCH and MRS. SADIE B. TISCH,

Petitioners,

vs.

ABE ZABLE,

Respondent.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### Opinion Below

The opinion of the Court of Appeals does not appear to have been reported. It is, however, set forth in full on page 47 of Petitioners' Transcript of Record (hereinafter abbreviated "Tr.").

### Jurisdiction

The question of jurisdiction is the issue before this Court.

## Question Presented

Where in an action for the dissolution of a joint venture and for an accounting, the District Court enters an order determining the defendants' liability, dissolving the joint venture, ordering the defendants to account to the plaintiff, referring the matter to a special master for the purpose of taking evidence on the question of damages in the accounting, and ordering the special master to make findings of fact and conclusions of law and submit same to the District Court, is such order an appealable "final decision" within the meaning of 28 U.S.C., Sec. 1291.

## Statute Involved

The statutory provision involved is 28 U.S.C., Sec. 1291.

## Statement of the Case

Respondent brought this action against Petitioners in the United States District Court for the Southern District of Florida, for the dissolution of a joint venture, for an accounting, and for the distribution to him of twenty-five per cent of the profits made by the joint venture in the operation of, and sale of the lease on, The Ambassador Hotel in Atlantic City, New Jersey. (Tr. 3) The cause went to trial, without a jury, and thereafter the District Judge, on March 16, 1959, signed an Opinion concluding that "the plaintiff sustained the essential allegations of his complaint by a preponderance of the evidence", and that the "allegations of the defendants' answer are not sustained by the facts and the law." The Court at the same time entered an "Interlocutory Order" wherein it ordered, adjudged and decreed that:

"1. The aforesaid joint venture is hereby dissolved.

"2. The defendants are hereby ordered to account to the plaintiff in accordance with the aforesaid Conclusions of Law, and to render a full, true and perfect account to the Special Master appointed herein.

"3. This cause is hereby referred to the Honorable O. B. Cline, Jr., who is hereby appointed Special Master herein, to hear proof on the defendants' accounting to the plaintiff on the quantum of profits made by the aforesaid joint venture and the quantum of the plaintiff's damages. The Special Master shall thereafter make findings of fact and conclusions of law with respect thereto and submit same to this Court with all convenient speed." (Tr. 16-20).

Petitioners filed a Motion for a New Trial (Tr. 20) which was denied (Tr. 31), and they thereafter filed Notice of Appeal to the Court of Appeals for the Fifth Circuit (Tr. 32). Respondent thereupon filed a Motion to Dismiss Appeal (Tr. 42). At the same time, Petitioners filed with the District Court a Motion for Stay and Supersedeas (Tr. 33). By Order dated May 6, 1959, the District Court denied this motion, and approved a stipulation of the parties that discovery proceedings be held in abeyance pending disposition of the matter by the Court of Appeals. (Tr. 34-35). Thereafter, the Motion to Dismiss Appeal was granted by the Court of Appeals and the appeal was dismissed. The Court in its order stated:

"ON CONSIDERATION of the motion to dismiss the appeal in the above entitled cause on the ground that the order from which the appeal is taken is not a final decision within the meaning of 28 U.S.C., Sec. 1291, nor an appealable interlocutory order within the purview of 28 U.S.C., Sec. 1292,

"IT IS ORDERED that said motion be granted, and that the appeal be hereby dismissed." (Tr. 47).

In connection with this abortive appeal, it should also be noted that Petitioners declined or neglected to avail themselves of such procedural rights as they may have had under 28 U.S.C., Sec. 1292 (b) to petition the District Court to certify the question of liability to the Court of Appeals.

## Argument

Respondent submits that the case of **Latta vs. Kilbourn**, 150 U.S. 524; 37 L.Ed. 1169 (1893) is directly in point and dispositive of the issue presented by this certiorari proceeding. **Latta** was a suit brought by members of a dissolved partnership against another member thereof for an accounting of profits made by the latter in certain transactions alleged to have been within the scope of the partnership business, and which the plaintiffs claimed it was the defendant's duty to have conducted for the benefit of the firm instead of for defendant's individual advantage. The proposition was advanced before this Court on appeal that the decree of the lower court determining liability and referring the case to an

auditor for an accounting was a final, appealable decree. The Court said, however, that:

> "We are clearly of opinion that this proposition cannot be sustained. It is well settled by the decisions of this court that where the purpose of the suit is to obtain an account, such as that prayed for by the bill in this case and directed by the order of October 27, 1886, the decree is of such an interlocutory character that no appeal will lie therefrom. Beebe v. Russell, 60 U.S. 19 How. 283, 285 [15:668]; Green v. Fisk, 103 U.S. 518 [26: 486]; Keystone Manganese & I. Co. v. Martin, 132 U.S. 91 [33: 275] Lodge v. Twell, 135 U.S. 232 [34: 153]; McGourkey v. Toledo & O.C.R. Co., 146 U.S. 544, 550 [36: 1083, 1085]. In this last case the authorities are thoroughly reviewed as to what constitutes a final decree, and it was laid down as the general rule that if the court made the decree fixing the rights and liabilities of the parties, and thereupon referred the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it referred the case to him for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final." 150 U.S. 524, 539; 37 L. Ed. 1169, 1175.

Indeed, this principle of appellate procedure had been announced many years before in **Beebe vs. Russell,** 60 U.S. 283, 286; 15 L. Ed. 668, 669 (1857), where the Court said:

> "But the reference of a case to a master, to take an account upon evidence, and from the examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, is not a final decree; because his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment."

Likewise in **Rexford vs. Brunswick-Balke-Collender Co.**, 228 U.S. 339, 346; 57 L. Ed. 864, 867 (1913), the Court held that a decree analogous to the one in the case at bar was not appealable, and stated that:

> "If it were, the case could be taken to the appellate court in fragments by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of the whole case."

And this Court has on numerous other occasions reiterated the rule that a decree establishing liability in an accounting action and referring the cause to a master to take evidence on the question of damages, is unappealable, and that the cause must proceed to a final money judgment before appellate review of the issue of liability will be allowed. **Perkins vs. Fourniquet**, 47 U.S. 206, 12 L. Ed. 406 (1848); **Craighead vs. Wilson**, 59 U.S. 199, 15 L. Ed. 332 (1856); **Keystone Manganese and Iron Co. vs. Martin**, 132 U.S. 91, 33 L. Ed. 275 (1889); **Lodge vs. Twell**,

135 U.S. 232, 34 L. Ed. 153 (1890); **McGourkey vs. Toledo and Ohio Central Railway Co.**, 146 U.S. 536, 36 L. Ed. 1079 (1892); **California National Bank vs. Stateler**, 171 U.S. 447, 449, 43 L. Ed. 233, 234 (1898).

In the case at bar, the Special Master will have far more to do than perform mere "ministerial duties", for he must hold a hearing on the involved question of damages, and thereafter make findings of fact and conclusions of law, and submit same to the District Judge. These findings and conclusions will be subject to exceptions, which will thereupon have to be ruled on by the District Court prior to entering its final money decree.

In addition, Petitioners' argument on the equities overlooks the countervailing equities of Respondent's position: Petitioners would have Respondent endure the inconvenience, expense, and delay of multiple appeals, notwithstanding the presumption of correctness that should inhere in the Interlocutory Order of March 16, 1959 establishing Petitioners' liability.

Finally, since appellate jurisdiction is based upon statutory law, Petitioners' dissatisfaction with the long-standing statutory interpretation of **Latta vs. Kilbourn, supra**, should be addressed to Congress and not to the courts. See **Montgomery Ward & Co. vs. The Cullins Estate, Inc.**, 237 F. 2d 253, 254 (4th Cir., 1956).

**There is No Conflict of Decisions**

Respondent submits that the authorities upon which Petitioners rely are in no way germane to the issue in this appeal.

In **Federal Trade Commission vs. Minneapolis-Honeywell Reg. Co.**, 344 U.S. 206, 97 L.Ed 245 (1952), the issue of "finality" turned simply upon whether the second of two decrees had altered any matters of substance or resolved any ambiguity in the first decree. The Court answered this question in the negative and held that the first decree was final. **Minneapolis-Honeywell** was not an accounting case, and the issue of whether a preliminary order determining liability alone, as distinguished from a subsequent money judgment establishing the exact amount of damages, was not before the court. Indeed, the Court in no way alluded to any of the numerous accounting cases cited above, all of which disapproved of fragmented appeals.

**Sinclair Refining Co. vs. Jenkins Petroleum Process Co.**, 289 U.S. 689, 77 L. Ed. 1449 (1933) had nothing to do with the question of appellate jurisdiction. The issue there was whether discovery proceedings could be had **prior to trial** on the issue of liability. In the case at bar, however, trial on the issue of liability has been completed and an order determining same has been entered. Hence, the requirements announced, by dictum, in **Sinclair** have been completely fulfilled in the instant case.

**Forgay vs. Conrad**, 47 U.S. 201, 12 L. Ed. 404 (1848) has on numerous occasions been limited in its scope and characterized by this Court as an exceptional case. In **Craighead vs. Wilson, supra**, decided only a few years after **Forgay**, the Court noted that in **Forgay** the order below had directed an execution sale and distribution of the proceeds thereof among the appellants' creditors, and that if the appeal did not lie at that point, appellants' property "under the decree, would have been disposed of

beyond the reach of the appellate court, so that an appeal would be useless." 59 U.S. 199, 202; 15 L. Ed. 332, 333. The peculiar character of **Forgay** was again noted by this Court in **Beebe vs. Russell,** 60 U.S. 283, 287; 15 L. Ed. 668, 669 (1857), and in **McGourkey vs. Toledo and Ohio Central Railway Co.,** 146 U.S. 536, 547; 36 L. Ed. 1079, 1084 (1892), where this Court again pointed out that the opinion in **Forgay** "was placed largely upon the ground that the decree not only decided the title to the property in dispute, but awarded execution." Clearly, no such exceptional circumstances obtain in the instant case, for the order below does not determine any question of title, nor award any execution.

**Delta Drilling Co. vs. Arnett,** 186 F. 2d 481 (6th Cir., 1950) is not in conflict with the decision of the Court of Appeals in this case, for there the lower court had entered a quiet-title decree in connection with its order that defendants also account to the plaintiff therein. The distinction between cases such as **Delta Drilling Co.,** on the one hand, and partnership accounting cases (such as the case at bar and the leading case of **Latta vs. Kilbourn, supra)** is clearly pointed out in **Jones vs. Schellenberger,** 225 F. 2d 784 (7th Cir., 1955). After discussing the **Latta** case at length, the court there stated that:

> "It is true that in some of the cases relied upon by plaintiff, a decree entered before an accounting had been taken was held to be appealable. It will be found, however, that in all of such cases the decree directing an accounting and held to be appealable awarded to the plaintiff and against the defendant **other affirmative relief** which could be realized and enjoyed prior to

the taking of an accounting. Delta Drilling Co. v. Arnett, 6 Cir., 186 F. 2d 481, in which a decree directing an accounting was held to be final and appealable, is typical." 225 F. 2d 784, 790. (Emphasis supplied).

The order of March 16, 1959 entered in the case at bar awards against the Petitioners no such "other affirmative relief", for it contains no **in rem** adjudication and establishes no possessory or proprietary rights in any specific property. It is simply an adjudication of liability looking toward an ultimate determination of **in personam** damages. Moreover, no execution can be had against Petitioners' property until the amount of damages is determined and incorporated in a final money judgment. When that money judgment is entered, the Petitioners will then, of course, have ample opportunity to appeal from the orders of the District Court on the questions both of liability and damages.

## There is No Novel or Important Question of Federal Law.

Respondent submits that the issue now before this Court was decided in **Latta vs. Kilbourn, supra,** and that the general principle governing the non-appealability of interlocutory orders in accounting cases was announced by this Court over a century ago in **Beebe vs. Russell, supra.** Hence, the issue can in no respect be termed a novel one. Moreover, Petitioners fail to demonstrate, in light of the foregoing, how the issue presented here can be considered to be of any national importance. Its importance to the litigants herein cannot of itself be deemed a sufficient predicate for certiorari jurisdiction.

Finally, Petitioners' assertion that they are confronted with a "confused" issue of appellate jurisdiction is ill-founded, for the rule announced in **Latta vs. Kilbourn, supra,** and the other authorities set forth herein, clearly define the proper appellate procedure to be followed in this case.

**Conclusion**

For the foregoing reasons, Respondent prays the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

Claude Pepper
and

Alfred I. Hopkins,
Counsel for Respondent.